Supreme Court, U.S.
FILED

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NO.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

ELOY GENER PEREZ and GRACIELA ALMODOVAR,

Petitioners
V.

STATE OF NEW JERSEY DIVISION OF YOUTH AND FAMILY SERVICES,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

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75 pp

QUESTIONS PRESENTED

1. Whether the application by the New Jersey Courts of the best interests of the child standard to terminate parental rights is unconstitutional.

2. Whether the best interests of the child standard was erroneously applied thus resulting in a wrongful termination of the petitioner's parental rights.

3. Whether the Division of Youth and Family Services of the State of New Jersey acted in such a way as to deprive the petitioner's of due process.

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OPINIONS BELOW

The Hudson County Superior Court of the State of New Jersey (Moser, J) adjudged petitioners to be fit parents, however, determined that their biological child had psychologically bonded with his foster parents and ordered that petitioners' parental rights be terminated. *In the Matter of the Guardianship of O.G., a minor.* (Opinion entered May 1, 1991 and attached as Appendix "F" hereto at 23a, order entered July 22, 1991 and attached as Appendix "G" hereto 33a).

The Appellate Division of the State of New Jersey remanded the case and did not retain jurisdiction, *In the Matter of the Guardianship of O.G., a minor.* (Opinion entered July 17, 1992 and attached as Appendix "E"hereto at 19a).

The Hudson County Superior Court of the State of New Jersey (Moser, J), once again adjudged the petitioners to be fit parents, however, determined that their biological child had psychologically bonded with his foster parents and ordered that petitioners' parental rights be terminated. *In the*

Matter of Guardianship of O. G. a minor. (Opinion entered November 9, 1992 and attached as Appendix "C" hereto at 4a order entered January 25, 1993 and attached as Appendix "D" hereto at 18a).

The Appellate Division of the State of New Jersey affirmed the Hudson County Superior Court. *In the Matter of Guardianship of O.G., a minor.* (Opinion entered on October 22, 1993 and attached as Appendix "B" hereto at 2a)

Petitioners appealed and petition for Certification to the Supreme Court of the State of New Jersey was denied on February 10, 1994. *In the Matter of the Guardianship of O.G., minor* (Appendix "A" hereto at 1a).

JURISDICTION

The Appellate Division of the State of New Jersey affirmed the decision of the New Jersey Superior Court on October 22, 1993. Petitioners appealed to the State of New Jersey Supreme Court and their Petition for Certification was denied on February 10, 1994. This petition is timely filed

Court's denial. Jurisdiction is invoked pursuant to 28 *U.S.C.* Sec. 1257(a).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Fourteenth Amendment to the United States Constitution provides:

> No State shall...deprive any person of life, liberty, or property, without due process law...

New Jersey Statute 30:4C-20 (Interlocutory order terminating parental rights and committing child to guardianship of Bureau) provides:

> If upon the completion of such a hearing the court is satisfied that the best interests of such child require that he be placed under proper guardianship, such court shall make an order terminating parental rights and committing such child to the guardianship***.

STATEMENT OF CASE

On November 16, 1990, respondent, the State of New Jersey Division of Youth and Family Services, filed a petition for guardianship in the New Jersey Superior Court alleging that minor, Olay Gener, had psychologically bonded with his fosterparents; and, therefore, a hearing should be held to terminate the parental rights of the petitioners. This relief was sought despite the fact that the Division of Youth and Family Services had returned the petitioners' three other children to them in August of 1990. The petitioners, having never been found unfit to parent, had complied with all of the requirements imposed upon them by the Division of Youth and Family Services for the return of their children.

On February 28, 1991, March 19, 1991, March 26, 1991 and March 28, 1991 a hearing was conducted. The expert of the Division of Youth and Family Services testified that, although the biological parents were not unfit to parent, there would be psychological harm to the child if he was removed from the home of his foster caretakers. Counsel for the petitioners argued that if the parents were not unfit, their child

should be returned to them as their other three children had been returned. The expert for the petitioners testified, that there may be some psychological harm to the child if he were returned to his biological parents, however, he was not convinced it would be insurmountable. Additionally, he testified that there may be psychological trauma to the child if he was to later learn that he was adopted, and that his biological parents had fought for his return to them and been denied his return.

The New Jersey Superior Court accepted the testimony of the State's expert and rejected the testimony of the petitioners' expert. The Superior Court determined, that the parental rights of the petitioners should be terminated, although they were fit parents, due to Olay having psychologically bonded with his foster parents.

> There is no doubt that the natural parents have made some significant progress in the past year with respect to their own interpersonal relationship and their relationship with the girls. The court does not know what happened in October, 1988. The court is glad to see the present progress, but cannot everlook (sic) the fact that the events of October, 1988 crippled either

> events of October, 1988 crippled either parents ability to function as a parent for almost two years. While this was not fatal to their relationship with the girls who were 5,6, and 7 at the time, it was with respect to Olay. Therefore, while the court believes the testimony of the New York social workers that all is going well at present in the Gener household, and believes Mr. Gener when he testified as to the help the family is getting from Reverend Manzano at the church the court believes it has no alternative but to terminate parental rights in the best interest of Olay.

See Appendix "F" hereto at 30a.

The Superior Court ostensibly applied the test set forth in *New Jersey Division of Youth and Family Services v. A.W.*, 103 *N.J.* 591, 512 *A. 2d* 438, (1986) and found that under this test promulgated by the Supreme Court of the State of New Jersey, it had the authority to terminate parental rights without finding the biological parents unfit. The test is as follows:

> 1. The child's health and development have been or will be seriously impaired by the parental rights; and
>
> 2. The parents are unable or unwilling to eliminate the harm and delaying permanent placement will add to the harm; and

3. The court has considered alternatives to termination; and

4. The termination of parental rights will not do more harm than good.

The Superior Court determined that the present case had met all of the *A.W.* prongs, and if the case met all of the prongs there could be a termination of parental rights, even upon a showing that the biological parents were fit, ready and willing to receive their biological child into their home.

The petitioners appealed the Superior Court's decision to the Appellate Division of the State of New Jersey arguing that given that they were fit parents it was unconstitutional to terminate their parental rights. Approximately fourteen months after the matter was tried, the Appellate Division remanded the case back to the New Jersey Superior Court. The Appellate Division instructed the Superior Court to reconsider the termination outcome in light of two cases that had recently been decided by the Supreme Court of the State of New Jersey, *In the Matter of the Guardianship of J.C. and J.M.C., minors,* 129 *N.J.* 1, 608 *A. 2d* 1312 (1992); and

In the Matter of the Guardianship of K.L.F., 129 *N.J.* 32, 608 *A. 2d* 1327 (1992).

On November 9, 1992 the New Jersey Superior Court, after reviewing *J.C.* and *K.L.F.*, re-affirmed its decision to terminate the parental rights of the petitioners, based on psychological bonding and not upon a finding of unfitness of the petitioners despite that in J.C. and K.L.F., although there were issues of bonding, the parental rights were not terminated.

The petitioners again appealed to the Appellate Division of the State of New Jersey. Arguing that it was unconstitutional to terminate their parental rights without a finding of unfitness. On October 22, 1993, the Appellate Division affirmed the Superior Court's decision to terminate the parental rights of the petitioners.

The petitioners appealed the Appellate Division's affirmance of the Superior Court decision and Petition for Certification. On February 10, 1994, the Supreme Court of the State of New Jersey denied petitioners' Petition for Certification and summarily dismissed the Appeal.

REASONS FOR GRANTING THE WRIT

I

In *Santosky v. Kramer*, 455 *U.S.* 745, 102 *S.Ct.* 1388, 71 *L. Ed. 2d* 599 (1982) this Court stated as follows:

> [U]ntil the state proves parental unfitness, the child and his parents share a vital interest in preventing erroneous termination of their natural relationship.

Id. at 760.

> Any parens patriae interest in terminating the natural parents' rights arises only at the dispositional phase, after the parents have been found unfit. (Emphasis added)

Id. at 767.

The reason this Court has taken a strong stance in preserving parent-child relationships, is because it has been determined that parents have a "fundamental liberty interest *** in the care, custody, and management of their child." *Id.* at 745. This fundamental liberty interest is protected by the Fourteenth Amendment of the United States Constitution. *See, Stanley v. Illinois*, 405 *U.S.* 645, 92 *S. Ct.* 1208 (1972),

Smith v. Organization of Foster Families, 431 *U.S.* 816, 97 *S. Ct.* 2094, 53 *L. Ed. 2d* 14 (1977). This Court stated in *Stanley v. Illinois*, "the state registers no gain towards its declared goals when it separates children from the custody of fit parents." *Id.* at 1213.

The petitioners contend that in applying *New Jersey Statute*, 30: 4C-20 and the test set forth in the *New Jersey Division of Youth and Family Services v. A.W., supra.*, the New Jersey Courts unconstitutionally terminated the petitioners' parental rights upon a theory of psychological bonding, rather than a finding of parental unfitness. The petitioners assert that in applying the best interests of the child standard, the New Jersey Courts violated the petitioners due process rights under the Fourteenth Amendment of the United States Constitution. The Fourteenth Amendment requires a finding of parental unfitness before parents can be deprived of their fundamental liberty right to raise their children.

New Jersey's statutory law and caselaw appears ambiguous at best with regards to when parental rights may be terminated. In the *Matter of Guardianship of J.C.*, 129

N.J. 1, 608 *A. 2d* 1312 (1992) , the New Jersey Supreme Court stated as follows:

> The standards for terminating parental rights established by the Legislature and this Court are fully consistent with constitutional doctrine. State law allowing for the termination of parental rights must satisfy the protections that surround family autonomy under the United States Constitution. Parents have a constitutionally-protected, fundamental liberty interest in raising their biological children, even if those children have been placed in foster care. *Santosky v. Kramer*, 455 *U.S.* 745, 102 *S. Ct.* 1388, 71 *L. Ed. 2d 599* (1982). Balanced against the constitutional protection of family rights is the State's *parens patriae* responsibility to protect the welfare of children. Because that power involves the State acting in the place of parents, it is limited to situations in which the state has demonstrated that the child's parent or custodian is unfit, *Developments in the Law, The Constitution and the Family*, 98 *Har.L.Rev.* 1156, 1219 (1980),or the child has been neglected or harmed, *see State v. Perricone*, 37 *N.J.* 463, 181 *A. 2d* 751, *cert. denied*, 371 *U.S.* 890, 83 *S. Ct.* 189, 246 *Pa S* 380, 9 *L.Ed. 2d* 124 (1962).

Matter of Guardianship of J.C., supra, at 9.

In this paragraph of the *J.C.* case the New Jersey Supreme Court appears in "sync" with the caselaw of the United States Supreme Court, and, in fact, cites the United States Supreme Court to support the position, that there must be a finding of unfitness of the biological parents for the State to terminate parental rights. In the case at hand, the biological parents were never found unfit. The father signed a voluntary placement order with the Division of Youth and Family Services. The parents were never deemed to have neglected or harmed their children. In fact, after the childrens' placement, it is conceded by the State that both parents visited with the children on a regular basis. After the petitioners complied with all of the requirements of the Division of Youth and Family Services, they were given custody of their three older children and denied the return of their youngest child. The petitioners were denied the return of their youngest child on a statutory standard referred to as the "best interests" of the child. This statutory standard is also referred to in *J.C., supra,* as follows: "[t]he critical question is whether termination of parental rights is justified under the broad statutory standard of section 15 (c) and section 20

predicated on the best interests of the child." *Id.* at 17. However, unlike the unfitness standard cited earlier in *J.C., supra*, there is no United States Supreme Court caselaw cited for this standard of termination of parental rights. In the instant case and in the *Matter of Guardianship of J.C., supra*, the Superior Courts of New Jersey conducted hearings to terminate parental rights based upon a theory of psychological bonding between the children placed in temporary custody and their foster caretakers. The Superior Court found that it was in the best interest of the children that their biological parents' rights be severed. No finding of unfitness was necessary. *In the Matter of K.L.F., supra*, the court reached a contrary result. However, in the concurring opinion of *J.C.*, it states: "[n]either fundamental notions of justice nor the Constitution permits termination based solely on the psychological bonding that takes place while the [parent] complies with the visitation provisions of a plan that purportedly has been designed - by DYFS - to foster eventual reunification." *Id.* at 30-31.

In the case of *K.L.F., supra*, the New Jersey Supreme Court incorporates the same law set forth in *J.C., supra*, to

support the theory of terminating parental rights based on a psychological bonding. Therefore, again no caselaw was offered by the Court in New Jersey that would reconcile this theory with The United States Supreme Court cases that require parental unfitness.

In the present case and in *J.C. and K.L.F.*, the State Courts relied heavily on the New Jersey Supreme Court case *New Jersey Division of Youth and Family Services v. A.W.*, 103 *N.J.* 591 512 *A. 2d* 438 (1986). In *A.W., supra.*, the Court cited the applicable New Jersey Statute for termination of parental rights as *N.J.S.A.* 30: 4C-15,20. The *A.W.* court determined, that under that statute the Division of Youth and Family Services may seek termination of parental rights under a best interests analysis. *Id.* at 600. The *A.W.* Court deemed, however, that the statute was vague on its face and a test must be established to determine what constitutes best interests. *Id.* at 601.[1]

1. The New Jersey legislature later expounded on the A.W. test, leaving one to conclude that they found *A.W.'s* test at the very least inadequate and/or unconstitiutional.

The *A.W. Court*, in citing *Santosky v. Kramer, supra*, stated, that "the Fourteenth Amendment requires application of at least a 'clear and convincing' standard of proof to a state's parental-rights-termination proceeding." *A.W., supra*, 103 *N.J.* 591. Conspicuously missing from this quote is the term "unfitness." The *A.W.* Court is advocating their standard is acceptable so long as it is by clear and convincing evidence. The best interest standard, whether viewed on its face, or in light of the *A.W.* test, does not offer the same constitutional protection as the unfitness standard. It enables the State to gain guardianship and ultimately termination of parental rights against biological parents that are fit and have complied with plans to reunify them with their natural children. This is evidenced by the case at hand, where the petitioners were reunited with three of their children, precisely because they were deemed fit and had complied with the Division of Youth and Family Services' plan to allow for reunification. The best interests standard and the *A.W.* test muddy the waters by allowing expert testimony to introduce psychological bonding as a basis for termination. This is particularly egregious when the expert testimony is clearly conflicting on the harm that

would result to the child. In *K.L.F., supra* the Superior Court accepted the expert testimony that favored no permanent harm would result to the child. In *J.C.*, the Superior Court of New Jersey rejected similiar expert testimony. In the present case the expert for the petitioners implored the Superior Court to consider the psychological harm that may result from adoption, however, this testimony fell on deaf ears. The Superior Court of New Jersey chose to accept the State's expert testimony that concluded substantial harm would result to the child.

The best interests standard pits the biological parents against the foster parents, which gives the foster parents the same constitutional protection as the natural parents. This Court in *Smith v. Organization of Foster Families,* 431 *U.S.* 816 97 *S. Ct.* 2094, 53 *L. Ed. 2d* 14 (1976) concluded as follows:

> "[T]he natural parent initially gave up his child to the State only on the express understanding that the child would be returned in those circumstances. These rights are difficult to reconcile with the liberty interests in the foster family relationship claimed by appellees. It is one thing to say

> that individuals may acquire a liberty interest against arbitrary governmental interference in the family-like associations into which they have freely entered, even in the absence of biological connection or state-law recognition of the relationship. It is quite another to say that one may acquire such an interest in the face of another's constitutionally recognized liberty interest that derives from blood relationship, state-law sanction, and basic human right--an interest the foster parent has recognized by contract from the outset. Whatever liberty interest might otherwise exist in the foster family as an institution, that interest must be substantially attenuated where the proposed removal from the foster family is to return the child to his natural parents.

Id. at 846.

In the present case the Division of Youth And Family Services with the help of the State fought the foster parent's battle for them over custody of Olay. The Division of Youth And Family Services sought, obtained and paid for an evaluation from their expert indicating that the child and the foster parents had psychologically bonded, prior to their even filing a petition for guardianship. The biological parents were

not interviewed by the expert at this time, however, the foster parents were interviewed. The foster mother admitted during this interview that she wanted to adopt Olay. This admission is evidence that she totally misunderstood or forgot her role as a foster parent. It also reveals that the Division of Youth and Family Services may have given her an expectation of adoption. See First Report of Dr. Dyer Appendix "H" hereto at 36a.

The State's expert concluded that "[e]ven a transfer of custody to the most attuned, skillful caretakers would be catastrophic for this child." Appendix "C" hereto at 9a Therefore, the message sent out by the State's expert is, that any parent who voluntarily places their child in foster care must be beyond the perfect parent, if they have any hope of regaining custody. The primary goal of the Division of Youth And Family Services is supposed to be the reunification of the natural parents with their child. The New Jersey Statute which controls the Division of Youth And Family Services Cite states:

> This act is to be administered strictly in accordance with the general principles laid

> (a) That the preservation and strengthening of family life is a matter of public concern as being in the interests of the general welfare.
>
> ***

N.J.S.A. 30:4C-1

The application of the best interests standard usurps the public policy of the State of New Jersey, which is to keep families united. Family relations should only be severed upon a showing of unfitness. The Michigan Supreme Court concluded recently in the case *In re Clausen*, 502 *N.W.* 2d 649 (Mich. 1993), a best interests hearing should not be conducted absent a showing of unfitness of the natural parents *Id.* at 652-653. The petitioners totally embrace the arguments and conclusions of law set forth by the Michigan Supreme Court. The Michigan Supreme Court succinctly said:

> While a child has a constitutionally protected interest in family life, that interest is not independent of its parents' in the absence of showing that the parents are unfit.

Id. at 652.

> [I]f the hearing establishes that the parent or parents have substantially complied with a limited guardianship placement plan, the court is required to terminate the guardianship without using the best interests test that is applied where there has not been such compliance.*** This is so even if the guardian could prevail on a best interests standard.

Id. at 661-662.

> The mutual rights of the parent and child come into conflict only when there is a showing of parental unfitness. As we held in a series of cases, the natural parent's right to custody is not to be disturbed absent such a showing, sometimes despite the preferences of the child.

Id. at 666.

> We recognize the long-established rule that the best interest of the child is of paramount importance,... and that it is our judicial duty to safeguard his welfare and care.... However, we never have interpreted such a rule so as to deprive a parent of the custody of his or her child, unless it was shown that the parent was an unsuitable person to have such custody.

Id. at 666 [citing *Liebert v. Derse*, 309 *Mich.* 495, 15 *N.W.* 2d 720 (1944)].

The facts in the above case are similar to the case at hand, in that there was no finding of parental unfitness. Therefore, in the above case, the preadoptive parents had no standing to request a best interests hearing regarding who should have custody of the child. The Division of Youth and Family Services should not have been granted a best interests hearing in the present case absent parental unfitness. The same issue of psychological bonding was present in the above case as in the present case. However, the Michigan and Iowa Courts did not deem it significant enough an issue to terminate the parental rights of the natural parents. The Michigan Supreme Court recognized that it was unconstitutional to terminate parental rights based on a best interest analysis. This Court, by denying the petitioners Writ of Certiorari, did not disturb the Michigan Supreme Court's decision.

II

If this Court is inclined to find that the best interests test and the test set forth in *New Jersey Division of Youth and Family Services v. A.W., supra,* are constitutional, than their

application in the case at had was unconstitutional. The first prong of the *A.W.* is that, "[t]he child's health and development have been or will be seriously impaired by the parental rights[.]" The petitioners' were never found unfit, neglectful, or to have abandoned their children. The children were placed in foster care due to the temporary breakdown in the parental relationship and the other crises that affected the parents' lives. Both parents kept in constant contact with the Division of Youth and Family Services and expressed their desire to regain custody of all of their children within months of the voluntary placement. The first prong of the *A.W.* test is not met. If they impaired the health and development of their children...why were their three other children returned to them? The Division of Youth And Family Services argued that the impairment of the child's health and development does not have to be the direct result of the parents' behavior. It can be an impairment caused by the severing of the child's relationship with the foster caretaker. This argument must fail. The impairment must fall within the context of unfitness, or it is unconstitutional under *Santosky v. Kramer, supra.*

The second prong of the *A.W.* test states: "[t]he parents are unable or unwilling to eliminate the harm and delaying permanent placement will add to the harm." The *A.W.* court defined harm as equivalent to "physical and sexual abuse." *Id.* at 604. The petitioners never committed an act of physical or sexual abuse against their children. The Superior Court, relying on the testimony of the State's expert, reasoned that the harm to the child would be the severance of the foster care relationship. This interpretation of harm must fail for the same reasons that the interpretation of the first prong fails. It is not based upon a finding of unfitness.

The third prong is whether "[t]he court has considered alternatives to termination." This prong was never discussed either directly or indirectly by the Superior Court. There was never a suggestion by the court to implement a plan to gradually reunite Olay with his parents and siblings. There was never a reason given as to why such a plan would fail.[2]

2. Ingrassia and Springen, *She's Not Baby Jessica Anymore.* March 21, 1994 at 60. Excerpts Appendix "I" hereto at 39a

The fourth and final prong to *A.W.* is, "[t]he termination of parental rights will not do more harm than good." This prong is read more easily as, the termination of parental rights will do more good than harm. In applying this prong the trial court weighed the parents' rights against what the court concluded was in the child's best interest. Relying on the State's expert, the court determined that the potential of psychological harm to the child was greater than the fundamental right to raise one's child. The court rejected expert testimony that concluded the harm may be minimal, and not permanent. It rejected testimony that the child may suffer other psychological problems as a result of being adopted. The court did not consider the psychological harm to the parents or their other children as a result of termination. It is precisely this prong that pits the natural parents against the system, and puts them on legal footing with the foster parents who are presumed to be perfect. The application of this prong in this fashion results in a unconstitutional outcome by prematurely putting the parents rights and child's rights in conflict.

The Superior Court of New Jersey interpreted and applied *A.W.* in a manner that deprived the petitioners of their Fourteenth Amendment right. Instead of interpreting the test in a manner that would either conclude the parents fit or unfit, it interpreted the test in a manner that was subjective, prejudicial and rendered the test vague.

III

As previously cited, the ultimate purpose of the Division of Youth and Family Services is to reunite children with their biological parents. *N.J.S.A.* 30:4C-1. The petitioner informed the Division of Youth and Family Services on April 20, 1989, six months after their placement, that he was revoking the voluntary placement agreement and wanted his children returned. It specifies in a Voluntary Replacement Agreement that upon a revocation the Division will either return the child or take the matter to court within five days. The Division of Youth And Family Services, however, did not return the children and did not bring the matter to court until close to six months later, September 7, 1989. The Division of

Youth and Family Services was granted custody of the children *ex parte* on that day. Thereafter, the Division of Youth and Family Services raised several obstacles which delayed the return of the children, some of which were valid, and others not valid. The Division worker directed that there be drug testing of the parents, however, when she testified, she acknowledged that she had no reason to suspect the parents were using drugs. The results of the drug screening were negative. This delayed the return of the children. The Division worker had represented to the Superior Court that the parents had failed to go to counseling. The petitioners, in fact, had gone five times to counseling and were dismissed by the counselor, because the parents stated to the counselor they did not have any present problems. This representation to the Superior Court further delayed the return of the children.

In the spring of 1990, the petitioners informed the Division that they had obtained an apartment that they believed would be acceptable to the Division to secure the return of the children. They found this apartment without any assistance from the Division.

In June of 1990, the Superior Court declined ordering the return of the petitioners' youngest child due to the Division of Youth and Family Services raising the issue of psychological bonding between Olay and his foster caretakers. The Court instructed the Division to file a petition for guardianship of Olay. In two subsequent Court appearances the Division had failed to file their petition for guardianship. Finally, five months after the June Court appearance, in November of 1990, the Division of Youth and Family Services amended their Protective Service Complaint, to ask for guardianship. During those five months the petitioners and their three children continued to visit with Olay twice a month as Court ordered.

During the time period the children were in foster care the Division of Youth And Family Services never considered placing Olay with his siblings. A placement with his siblings would have made the transition from foster care to his biological parents less traumatic. Additionally, during the childrens' placement the petitioner asked that his pastor be considered for placement of all of the children. The Division never investigated this possibility.

It is contended by the petitioners that the Division of Youth And Family Services acted in such away as to delay their reunification with their children. The result was that they were denied procedural due process under the fourteenth amendment. The Division did not make diligent efforts to reunify the family. This is contrary to the public policy of the State of New Jersey and the mandates in the applicable statutory law. Permitting termination of parental rights based upon psychological bonding after such a woefully defective procedural process violates the natural parent's rights under the fourteenth amendment.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

SUPREME COURT OF NEW JERSEY
C-596 September Term 1993
37,704

NEW JERSEY DIVISION OF YOUTH AND FAMILY SERVICES.

Plaintiff-Respondent,

v. ON PETITION FOR CERTIFICATION

E.G. AND G.A.,

Defendnats-Petitioners.

To the Appellate Division, Superior Court:
A petition for certification of the judgment in A-3280-92 having been submitted to this Court, and having considered the same;

It is ORDERED that the petition for certification is denied with costs; and it is further

ORDERED that the appeal filed in the within matter is dismissed pursuant to Rule 2:12-9.

WITNESS, the Honorable Robert L. Clifford, Presiding Justice, at Trenton, this 8th day of February, 1994.

/s/ Stephen W. Townsend
CLERK OF THE SUPREME COURT

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-3280-92T5

NEW JERSEY DIVISION OF YOUTH
AND FAMILY SERVICES,

Plaintiff-Respondent,

v.

E.G. and G.A.

Defendant-Appellants,

Argued September 29, 1993-- Decided Oct 22 1993

Before Judges Gaulkin, R.S. Cohen and D'Annunzio

On appeal from the Superior Court, Chancery Division-Family Part, Hudson County

Karen Kirchoff Saminski argued the cause for appellants (Signorile & Saminski, attorneys).

Geraldine O. Livengood, Deputy Attorney General, argued the cause for the respondent (Fred DeVesa, Acting Attorney General, attorney ; Andrea M. Silkowitz, Assistant Attorney General, of counsel).

Donna DelPrete Marki, Guardian ad litem, argued the cause pro se.

PER CURIAM

This action was brought by the Division of Youth and Family Services (DYFS) to terminate the paternal rights of defendants E.G. and G.A. to their son, O.G., who is now over five years old and has been in foster care since he was two months old. Following a trial conducted in early 1991, Judge Moser entered judgment terminating the parental rights. On defendants' appeal, we remanded the matter to Judge Moser for reconsideration in light of In the Matter of the Guardianship of J.C., 129 N.J. 1 (1992) and In the Matter of the Guardianship of K.L.F., 129 N.J. 32 (1992), which had been issued during the pendency of the appeal. DYFS v. E.G.and G.A., A-585-91T3, decided July 17, 1992. Judge Moser promptly held further hearings, at the conclusion of which he again ordered termination of the parental rights. Defendants appeal. We affirm

In his November 9, 1992 letter opinion, Judge Moser gave thorough and thoughtful consideration to the proofs before him and to the teaching of J.C., and K.L.F. and the earlier cases. Our own consideration of the record satisfies us that the findings of fact recited and that those finding in turn fully justify the conclusions of law and ultimate announced by Judge Moser.

The January 25, 1993 judgment is affirmed. The matter is remanded, however, to the trial court to determine who, if anyone, should reimburse the Administrative Office of the Courts for payment of the transcripts. Se Directive #9-89 of Chief Justice Wilentz, issued September 20, 1989.

END.

SUPERIOR COURT OF NEW JERSEY

GEORGE P. MOSER JR JSC

ADMINISTRATION BUILDING
595 NEWARK AVENUE
JERSEY CITY, N.J. 07306

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

November 9, 1992

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RE: GUARDIANSHIP OF OLAY GENER
FG-09-73-91

Dear Counsellors:

The above matter was remanded from the Appellate Division for reconsideration in light of the New Jersey Supreme Court decisions in Matter of Guardianship of J.C. 129 N.J. 1 (1992) and Matter of Guardianship of K.L.F. 129 N.J. 32 (1992). A recitation of the facts as found by this

Court after the trial is necessary before considering the impact of the recent cases.

Olay Gener was born on August 20, 1988, the fourth child both to Eloy Gener and Graciela Almodovar. The siblings, Eva, Diana and Samaris were born in 1981, 1982 and 1983, respectively. At the time of Olay's birth the family was living at 528-25th Street, Union City, New Jersey.

The Division of Youth and Family Services (DYFS) became involved with the Gener family on October 29, 1988 when a referral was received from the Union City Police. Angel Torres responded on behalf of DYFS and found the children in the care of one Maria Garcia who said she had been there sixteen days. The children were described as unkempt. He learned that the father Eloy Gener had been stabbed the night before and was in St. Mary Hospital. The mother's whereabouts were unknown. Mr. Torres interviewed Eloy Gener at the hospital. He was evasive concerning Graciela Almodovar. He said she was kidnapped and raped. He didn't know where she was.

Eloy Gener signed a placement agreement with DYFS on October 27, 1988. He had been taken to jail. The child, Olay Gener, was two months old.

On November 21, 1988 Graciela Almodovar called DYFS. On November 23, 1988 she came to the DYFS office. On that date Elena Garcia-Rivas took over the handling of the case for DYFS. She interviewed the mother who said she had been at her sister's in Pennsylvania. She understood she had left a small infant, but was vague about her reasons. She had no residence.

On December 6, 1988 Mr. Gener called from jail. He was upset. He blamed Ms. Almodovar for everything. She was an adulteress. He didn't want her to see the children.

On December 15, 1988 Olay Gener was placed with his present caretaker. Olay Gener was four months old.

On December 22, 1988 the mother visited with the children. She had not found an apartment. Mr. Gener called from jail. On January 11, 1989 she visited; he called from jail. On February 8, 1989 she did not appear for a visit. He called from jail and discussed custody. He wanted custody. He said she had abandoned the children. He didn't want her to have custody.

On March 17, 1989 Mr. Gener called DYFS. He got out of jail. He came to the office. He did not know where Ms. Almodovar was.

On March 27, 1989 there was a visit which both parents attended. This was unexpected. They hadn't seen each other before. There was an alternation (sic). Both were angry.

Both parents were psychologically evaluated by Dr. Ernesto L. Perdomo in March, 1989. His reports are in evidence.

On April 6, 1989 Mr. Gener called DYFS and said Ms. Almodovar was a drug user and that he didn't want the kids given to her.

On April 24, 1989 there was a visit with both parents. Olay didn't want to go to Mr. Gener. The child did respond all right to his sisters.

On May 2, 1989 Mr. Gener discussed plans. He said Ms. Almodovar had endangered the children. He didn't want her to have them.

On May 25, 1989 Ms. Almodovar was employed and living at the Y in Jersey City. She still insisted that she had been taking care of a sick sister in Pennsylvania prior to her return to new Jersey. It was impossible to unify the children with her at that time.

On June 14, 1989 Mr. Gener said he had no plans to return to Ms. Almodovar.

On August 22, 1989 the DYFS worker and supervisor met with both parents. The meeting was described as explosive. They were still very angry at each other. He berated her. He called her a whore. He threatened her with harm. He wanted custody with no visitation rights on her part. More significantly, at that time, when Olay was now a year old and had been in foster care for ten months and with his present caretaker for eight months neither of the parents had a residence to which the children could be taken. DYFS advised the parents that DYFS was going to seek custody of the children.

On October 3, 1989 there was a visit with Olay. He cried a lot. He didn't want to go with his father and cried when his mother picked him up.

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On January 31, 1990 counselling was discussed with Mr. Gener. He didn't want to go.

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By April 25, 1990 the parents were again living together. Mr. Gener discussed a return of the children with DYFS. He said he would be the caretaker.

On June 22, 1990 DYFS visited the apartment the parents had rented. Mr. Gener was still harboring ill feelings toward Ms. Almodova (sic). He said he wasn't sleeping with her, but he realized that she was the mother of the children. He said he would care for the kids. He also said that a priest was counselling them. DYFS advised that they were thinking of returning the girls but not Olay because Olay's bond with his foster parents. Mr. Gener's attitude was for DYFS to return all or none of the children.

On August 10, 1990 the three girls returned home. Olay was just shy of his second birthday.

The rather long chronicle of events between October 20, 1988 and August 10, 1990 is important in this case for two reasons. First, it leads to the finding that foster care for the children was necessary and that reunification was impossible with either parent individually during that period of time. Secondly, it underscores the reason why Olay is bonded to his foster parents. The time period covers a most critical period in any child's life, from age 2 months to age 2 years. It is not necessary to argue over whether or not Olay is bonded to his foster parents. Dr. Ronald G. Silikovitz, the psychologist retained by the defendants states after observing Olay with his foster parents, "It is clear and indisputable that Olay is deeply bonded to Mr. and Mrs. M., who have raised him since he was almost four months old and have him in their care for more than two years, and that the M's are

deeply bonded to Olay. They indeed regard each other psychologically as if they were parents and son, Olay is an integral part of the Miranda home and relates well with affection both of his foster parents and his foster sister."

Dr. Frank J. Dyer testified for DYFS and his report dated April 30, 1990 was admitted as evidence. He, of course, found Olay to be "bonded emotionally to his foster parents." The focus of this case, however, is not on the bonding which is conceded but on the harm that may result from a break of that bond and a return to the biological parents. Dr. Dyer said in his report"

> "Removal of this boy from the foster parents would inflict extreme emotional duress upon him by depriving him of his psychological parents. Even a transfer of custody to the most attuned, skillful caretakers would be carastrophic for this child, who has known only the Ms as his parental love objects. A return of custody to unstable, inadequate caretakers, as the natural parents have proven to be would severely compound the emotional damage resulting from such a loss. Even with a child as young as 19 months of age, the permanent harmful effects of a separation from the psychological parents cannot be overestimated. Such effects would include impairments of basis trust, self esteem, ability to form close emotional ties to others, and capacity to look forward with confident

expectation to predictable interpersonal environment."

In his testimony Dr. Dyer said that separation of Olay from his caretakers would constitute a trauma, that separation would deal a devastating blow to Olay. He stated his opinions with a "high degree of psychological certainly." His opined that if Olay were returned to attuned caretakers he would still suffer irreversible psychological harm which could be mitigated by skilled caretaking but would not be fully reversible. He would suffer a life long impairment. The consquences would include a predisposition to pathologic depression, borderline personality disorder, something between neurosis and psychosis. Interpersonal relationships would be shallow.

Dr. Dyer had opportunity to observe Olay with his natural parents in February , 1991. He found no bond. He testified that it is his strong opinion that we have passed the point of possible bonding between Olay and his natural parents and that Olay never had a bond with them.

Dr. Silikovitz differed with Dr. Dyer. He said that Olay is somewhat bonded with his natural parents and siblings. He also differed with Dr. Dyer on the issue of harm to Olay if he's separated from his foster parents and returned to his natural parents. He did not believe Olay will be harmed. He believed that the natural parents are "skilled and tuned." He believed there would be more harm in the future when Olay finds he was abandoned by his parents and adopted. He pointed to his understanding that adoptees in general have more psychological problems than natural children. He conceded that the present foster parents are remarkably sensitive to the child's needs. He stated the effect of removal is unpredictable but there should be no problem if Olay is gradually reunited with the natural parents. He

doubted the literature on the subject of harm to children who are removed from their psychological parents.

This court adopted the opinions of Dr. Dyer with respect to the potential harm to Olay if he were removed from this foster family. The harm of separation from the natural family by virtue of termination of parental rights would be negligible according to Dr. Dyer. This court agreed. While Olay like may adoptees may have some reaction during adolescence due to intense curiosity concerning his biological origin, any harm or upset according to Dr. Dyer would be insignificant compared to removal of Olay from his present caretakers. Again, this court agreed.

This court did not find that the natural parents were particularly skilled or tuned as parents. They may be adequate as is evidenced by their ability to parent the three girls but they certainly show no special skill as would be required to mitigate the harm of removal of a 2 1/2 years(sic) old from the only caretakers he has known. Dr. Ernesto Perdomo's psychological evaluations are illuminating on this point. He said, "It is obvious that the Gener children will be at risk with either parent." With reference to Mr. Gener he said "Mr. Gener is an anxious and impulsive individual that may act out with violent outburst. He feels very insecure and he has a poor self-image." Of Ms. Almodvar he said, "Ms Almodovar's ability to establish a good caring parental relation with her children is severely impaired due to her egocentric personality style. She reduces all relationships to the satisfaction of her own depending and affective needs while she herself is unable to give affection. Ms. Almodovar's children will always be at risk of emotional neglect and abuse due to their mother's personality disorder....."

There was no doubt that the natural parents had made some significant progress in the past years with respect to their own interpersonal relationship and their relationship with the girls. The court did not know what happened in October, 1988. The court was glad to see the present progress, but could not overlook the fact that the events of October, 1988 crippled either parent's ability to function as a parent for almost two years. While this was not fatal to their relationship with the girls who were 5,6 and 7 at the time, it was with respect to Olay. Therefore, while the court believed the testimony of the New York social workers that all was going well in the Gener household; and believed Mr. Gener when he testified as to the help the family is getting from Reverend Manzano at the church the court believed it had no alternative but to terminate parental rights in the best interest of Olay. The court felt that the crisis in the lives of Eloy Gener and Graciela Almodovar came at the wrong time and lasted too long a time for them to be able to establish a parent-child relationship with Olay without significant permanent harm to the child.

Since the trial of the case which concluded in April, 1991 the parties agree that the status quo has prevailed. Eloy Gener and Gracila Almodovar are still together and are raising the three girls. Olay Gener remains in the same foster home with a family ready, willing and able to adopt him. There was an incident which occurred during a visit on August 31, 1992 at the DYFS office and which was the subject of a hearing October 1, 1992. Betty Miller, a home service aide employed by DYFS, not involved with the case, testified that she observed Olay Gener crying while his mother had him by the hand and that Mr. Gener came over and hit the child on the side of the head with his open hand. The observation was made through a one way mirror. When Mr. Gener was later confronted with it he denied it saying he was playing with the child. Ms. Miller insisted he was not

playing. The child, she said, continued screaming. Ms. Almodovar denied that the incident occurred. When Charles Cohen, the DYFS worker came onto the scene he said he terminated the visit because the child was upset.

The incident of Augsut 31st standing alone does not have much significance. It does provide some incite, however, into whether Mr. Gener is an attuned, skilled caretaker. It would tend to confirm Dr. Perdemo's finding that he is an "impulsive individual that may act out with violent outburst."

This court's conclusion after the trial was that parental rights should be terminated. This court found that a return of the child to his parents would result in harm to the child. The N.J. Supreme Court in New Jersey Div of Youth and Family Services v. A.W. 103 N.J. 591 (1986) had said at p. 605, "The potential return of a child to a parent may be so injurious that it would bar such an alternative.... The trial court therefore must consider the potential for serious psychological damage to the child." This court found that to be the case with respect to Olay Gener.

Should this court reverse its conclusion in light of J.C. and K.L.F. supra? The opinion of this court is that it should not. In J.C. the Supreme Court remanded the case to the trial court "in order that additional evidence may be adduced directly addressing whether the two children have bonded with their foster parents and if so whether breaking such bonds would cause the children serious psychological or emotional harm." 129 N.J. 1 at p. 25. In this case both experts concurred on the issue of bonding. Olay Gener is bonded to his foster family. The experts differed on the question of the extent of harm to Olay if he was returned. This court adopted the opinions of Dr. Dyer and continues to do so. Those opinions satisfy the standards expressed in J.C.

at p. 19, "DYFS must prove by clear and convincing evidence that separating the child from his or her foster parents would cause serious and enduring emotional or physchological harm."

I.C. was remanded to the trial court because the Supreme Court was not satisifed with the quality if the evidence which it thought "was either flawed or insuffucuient to answer the central question of serious psychological harm." I.C. p. 18. The Court continued to say. "the quality of proof adduced must be consistent with the interests at stake." In this case Dr. Dyer is unquestionably qualified. Dr. Silikovitz conceded his expertise. Futhermore Dr. Dyer had seen the child with the natural parents as well as the foster parents. This is important in light of the Supreme Courts direction in I.C. at p. 19 that "the trial court must also consider parallel proof relating to the child's relationship with his or her natural parents in assessing the existence, nature, and extent of the harm facing the child." Dr. Dyer described his observations of the child and the natural parents during his testimony. He said on page 28 of the transcript of March 19, 1991, "I did not observe any evidence of any positive connection between this child and his natural parents at any time during this observation." When asked his opinion with respect to Olay's conduct as he observed it he said again on page 28, " the behavior that I observed in his session indcaites to me that this child does not have any positive emotional connection to his natural parents. On contrary, he seems to perceive them as significant threat to his emotional security. And I would like to add that this visit was one of the worst observations that I have ever conducted of children with any sort of caretaker, worst in the sense of a child's displaying such consistently negative behavior and emotion toward the individuals with whom that child is being observed."

Dr. Silikovitz, who testified for the natural parents is also qualified, but this court did not find that the was firm in the opinion he was trying to give that Olay would not be harmed by a return to his parents. For example, the following is an excerpt of cross examination from the transcript of March 26, 1991 at p. 42,

Q. Un-hum. And in your report, before you changed your mind in the past six weeks, there was no question in your mind that removal of this child from these parents would be traumatic, is that correct?

A. I didn't change my mind, by the way. But I--

Q. Well, you did put that in your report earlier, that it would be traumatic.

A. I'm modifying a judgment as far as severity of trauma, I think, I don't think I'm changing my mind.

Q. Well, you testifed this morning that you didn't even think there would be trauma, you couldn't predict.

A. I couldn't predict. I think there might be, I'm not sure.

Q. Okay

A. I didn't say there wouldn't be.

Q. And--

A. I never said there wouldn't be. I'm not sure, there might be, there might not be. It might be severe, it might not be severe. It's hard to tell."

This court does not believe that J.C. supra. represents a substantial change in the law regarding termination of parental rights. Rather, it emphasizes and tightens the requirements of clear and convincing proof particularly where psychological bonding and not parental unfitness is the basis on which the case is proceeding. J.C. did not overrule prior cases such as Sorrentino v. Family and Children's Society 72 N.J. 127 (1976) and 74 N.J. 313 (1977) or In re Guardianship of J.R. 174 N.J. Super 211 (App. Div. 1980). This court has the advantage of having been the trial court in J.C. and the case at bar. The flaws and insufficiencies of proof found in J.C. simply don't exist in this case. The quality of expert testimony supports termination. The observations of others such as the guardian, Donna Marki, and the DYFS worker Charles Cohen support the testimony of Dr. Dyer. J.C. points out at p.23 that agency social workers are a major source of guidance for the trial court. In short, the bases that were untouched in J.C. have been touched in this case so as to warrant a reaffirmation of this court's judgment to terminate parental rights .

K.L.F. supra is readily distinguishable from the case. First, there was apparently mishandling of the case by DYFS in failing to make better efforts to reunite the family. Secondly there was evidence based on the ease with which the child transferred from one set of foster parents to another that serious harm would not result from a transfer to the natural mother. Thirdly, there was evidence that not only was B.F., the mother, a fit parent, but also one who "will also be able to cushion the stress that will inevitably accompany the return of K.L.F.." Fourthly, the trial court found that DYFS expert was personally hostile toward B.F. These factors don't exist in this case. In K.L.F. the trial judge had ample ground upon which to deny termination and order a return of the child and the Supreme Court agreed.

In conclusion, therefore, and having considered the evidence and prior decision in light of J.C. and K.L.F. it is this courts determination that the parental rights of Eloy Gener and Graciela Almodovar to Olay Gener be terminated so that he may be freed for adoption.

Ms. Livengood should submit an order.

Yours very truly,

/s/ George P. Moser
George P. Moser, Jr., J.S.C.

GPM:af
File

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(201) 795-5566
Attorney for Defendants

DIVISION OF YOUTH AND FAMILY SERVICES Plaintiff -vs- ELOY GENER AND GRACIELA ALMODOVAR : Defendant	:	SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION, FAMILY PART HUDSON COUNTY DOCKET NO. FG-09-73-91 CIVIL ACTION ORDER

THIS MATTER having been heard before the Court on October 1, 1992, on remand from the Appellate Division and the Court having heard the arguments of Counsel on behalf of the parties, and having had an opportunity to review the submission of papers and supporting documents, and good cause shown;

IT IS on this 25th day of January, 1993,

ORDERED that the parental rights of Eloy Gener and Graciela Almodovar as to their son, Olay Gener, are hereby terminated; and it is further

ORDERED that visitation shall continue as previously Ordered at two (2) hours per month pending appeal.

/s/ George P. Moser
George P. Moser, J.S.C.

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-3280-92T5

NEW JERSEY DIVISION OF YOUTH
AND FAMILY SERVICES,

Plaintiff-Respondent,

v.

E.G. and G.A.

Defendant-Appellants,

IN THE MATTER OF THE GUARDIANSHIP OF
O.G., a minor

Argued March 30, 1992- Decided JULY 17 1992

Before Judges Petrella and R.S. Cohen.

On appeal from the Superior Court, Chancery Division, Family Part, Hudson County.

Karen Kirchoff Saminski argued the cause for appellants.

Geraldine O. Livengood, Deputy Attorney General, argued the cause for the respondent (Robert J. Del Tufo, Attorney General, attorney, Andrea M Silkowitz, Assistant Attorney General. of counsel, and Ms. Livengood on the brief).

Donna Del Prete Marki argued the cause for O.G.

PER CURIAM

This is a DYFS action to terminate parental rights. After a plenary hearing, the Family Part judge decided that the parental rights of E.P. and G.A. should be terminated as to their son, O.G. O.G. was born on August 20, 1988. He was two months old when he was placed in foster care. His natural parents have three other children, all girls, now ranging from almost 11 years old to 9 years old. The girls were also placed in foster care in October 1988. Unlike O.G., however, they were returned to the parents' custody in August 1990. They remain there, and, so far as we know, are flourishing.

We do not mean to deprecate DYFS efforts for the children or to suggest that the 1988 placements in foster care were not necessary or in the children's (sic) best interests. The evidence is substantial that E.P. and G.A. were then in severe personal and legal difficulties, that the family unit was shredded, and that removal of the children from the unstable situation was absolutely necessary. The question before the Family Part judge, and before us, however, is whether the subsequent amelioriation of the parents' situation, sufficient to justify return of the three girls to their parents in 1990, does not require the same course for O.G., notwithstanding the fact that he has lived since December 1988, substantially his entire life, with his foster parents.

The Family Part judge explained his decision to termiante parental rights in an opinion letter dated May 1, 1991. He recited the unfortunate history of the family and the reunification of the parents and three girls in 1990.

The judge clearly explained that there was conflicting expert testimony before him on the question whether O.G.'s emotional bonding to his foster parents created an insuperable barrier to natural family reunification for O.G. Dr. Frank Dyer opined that removal from the foster home would be "castastrophic" for O.G., even if his natural parents were "the most uttuned, skillful caretakers." Instead, he said, E.P. and G.A. were "unstable, inadequate caretakers." Dr. Dyer predicted emotional damage, and permanent harmful consequences to O.G.

Dr. Ronald G. Silikovitz disagreed. He predicted difficulties, but not insuperable ones, and thought E.G. and G.A. had better potential skills than Dyer thought to deal with O.G. and reestablish family bonds with him.

The judge was not so sanguine about the parents and chose to accept Dr. Dyer's views and reject Dr. Silikovitz's.

We are not at all sure that the judge's substantial concentration on the factor of O.G.'s bonding with his foster parents is sufficient to support the decision to terminate parental rights. The New Jersey Supreme Court has very recently dealt with the subject in In re Guradianship of J.C., _____ N.J. ___ (1992), and In re Guradianship of K.L.F., _____ N.J. _____ (1992), both decided June 30, 1992. Because these opinions were issued during the pendency of this appeal, their guidance controls.

For that reason, we remand to Judge Moser for the purpose of reconsidering the judgment in light of J.C. and K.L.F. He may require such briefs and argument as he believes appropriate. In the event any party seeks the opportunity to present factual updating of relevant matters since last year's hearing, Judge Moser will have the

authority to grant or deny the opportunity in the exercise of his sound discretion. We do not retain jurisdiction.

SUPERIOR COURT OF NEW JERSEY

GEORGE P. MOSER JR JSC

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May 1, 1991

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RE: GUARDIANSHIP OF OLAY GENER
FG-09-73-91

Dear Counsellors:

The above matter was tried on February 28, March 19 and March 26, 1991. Written summations were received by the Court on April 5 and April 10, 1991 and Defendant's response to plaintiff summation on April 16, 1991. The court makes the following findings.

Olay Gener was born on August 20, 1988, the fourth child born to Eloy Gener and Graciela Almodovar. The siblings, Eva, Diana and Samaris were born in 1981, 1982 and 1983, respectively. At the time of Olay's birth the family was living at 528-25th Street, Union City, New Jersey.

The Division of Youth and Family Services (DYFS) became involved with the Gener family on October 29, 1988 when a referral was received from the Union City Police. Angel Torres responded on behalf of DYFS and found the children in the care of one Maria Garcia who said she had been there sixteen days. The children were described as unkempt. He learned that the father Eloy Gener had been stabbed the night before and was in St. Mary Hospital. The mother's whereabouts were unknown. Mr. Torres interviewed Eloy Gener at the hospital. He was evasive concerning Graciela Almodovar. He said she was kidnapped and raped. He didn't know where she was.

Eloy Gener signed a placement agreement with DYFS on October 27, 1988. He had been taken to jail. The child, Olay Gener, was two months old.

On November 21, 1988 Graciela Almodovar called DYFS. On November 23, 1988 she came to the DYFS office. On that date Elena Garcia-Rivas took over the handling of the case for DYFS. She interviewed the mother who said she had been at her sister's in Pennsylvania. She understood she had left a small infant, but was vague about her reasons. She had no residence.

On December 6, 1988 Mr. Gener called from jail. He was upset. He blamed Ms. Almodovar for everything. She was an adulteress. He didn't want her to see the children.

On December 15, 1988 Olay Gener was placed with his present caretaker. Olay Gener was four months old.

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Both parents were psychologically evaluated by Dr. Ernesto L. Perdomo in March, 1989. His reports are in evidence.

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On June 22, 1990 DYFS visited the apartment the parents had rented. Mr. Gener was still harboring ill feelings toward Ms. Almodova (sic). He said he wasn't sleeping with her, but he realized that she was the mother of the children. He said he would care for the kids. He also said that a priest was counselling them. DYFS advised that they were thinking of returning the girls but not Olay because Olay's bond with the foster parents. Mr. Gener's attitude was for DYFS to return all or none of the children.

On August 10, 1990 the three girls returned home. Olay was just shy of his second birthday.

The rather long chronicle of events between October 20, 1988 and August 10, 1990 is important in this case for two reasons. First, it leads to the finding that foster care for the children was necessary and that reunification was impossible with either parent individually during that period of time. Secondly, it underscores the reason why Olay is bonded to his foster parents. The time period covers a most critical period in any child's life, from age 2 months to age 2 years. It is not necessary to argue over whether or not Olay is bonded to his foster parents. Dr. Ronald G. Silikovitz, the psychologist retained by the defendants states after observing Olay with his foster parents, "It is clear and indisputable that Olay is deeply bonded to Mr. and Mrs. M., who have raised him since he was almost four months old and have him in their care for more than two years, and that the M's are deeply bonded to Olay. They indeed regard each other psychologically as if they were parents and son, Olay is an integral part of the Miranda home and relates well with affection both of his foster parens and his foster sister."

Dr. Frank J. Dyer testified for DYFS and his report dated April 30, 1990 was admitted as evidence. He, of course, found Olay to be "bonded emotionally to his foster parents." The focus of this case, however, is not on the bonding which is conceded but on the harm that may result from a break of that bond and a return to the biological parents. Dr. Dyer said in his report"

> "Removal of this boy from the foster parents would inflict extreme emotional duress upon him by depriving him of his psychological parents. Even a transfer of custody to the most attuned, skillful caretakers would be carastrophic for this child, who has known only the Ms as his parental love objects. A return of custody to unstable, inadequate caretakers, as the natural parents have proven to be would severely compound the emotional damage resulting from such a loss. Even with a child as young as 19 months of age, the permanent harmful effects of a separation from the psychological parents cannot be overestimated. Such effects would include impairments of basis trust, self esteem, ability to form close emotional ties to others, and capacity to look forward with confident expectation to predictable interpersonal environment."

In his testimony Dr. Dyer said that separation of Olay from his caretakers would constitute a trauma, that separation would deal a devastating blow to Olay. He stated his opinions with a "high degree of physcological certainly." his opined that is Olay were returned to attuned caretakers he would still suffer irreversible psychological harm which could be mitigated by skilled caretaking but would not be fully reversible. He would suffer a life long impairment. The consquences would include a predisposition to pathologic depression, borderline personality disorder, something between neurosis and psychosis. Interpersonal relationships would be shallow.

Dr. Dyer had opportunity to observe Olay with his natural parents in February , 1991. He found no bond. He testified that it is his strong opinion that we have passed the point of possible bonding between Olay and his natural parents and that Olay never had a bond with them.

Dr. Silikovitz differed with Dr. Dyer. He said that Olay is somewhat bonded with his natural parents and siblings. He also differed with Dr. Dyer on the issue of harm to Olay if he's separated from his foster parents and returned to his natural parents. He did not believe Olay will be harmed. He believed that the natural parents are "skilled and tuned." He believed there would be more harm in the future when Olay finds he was abandoned by his parents and adopted. He pointed to his understanding that adoptees in general have more psychological problems than natural children. He conceded that the present foster parents are remarkably sensitive to the child's needs. He stated the effect of removal is unpredictable but there should be no problem if Olay is gradually reunited with the natural parents. he doubted the literature on the subject of harm to children who are removed from their psychological parents.

This court adopted the opinions of Dr. Dyer with respect to the potential harm to Olay if he were removed from his foster family. The harm of separation from the natural family by virtue of termination of parental rights would be negligible according to Dr. Dyer. This court agreed. While Olay like may adoptees may have some reaction during adolescence due to intense curiosity concerning his biological origin, any harm or upset according to Dr. Dyer would be insignificant compared to removal of Olay from his present caretakers. Again, this court agreed.

This court did not find that the natural parents were particularly skilled or tuned (sic) as parents. They may be adequate as is evidenced by their ability to parent the three girls but they certainly show no special skill as would be required to mitigate the harm of removal of a 2 1/2 years (sic) old from the only caretakers the has known. Dr. Ernesto Perdomo's psychological evaluations are illuminating on this point. He said, "It is obvious that the Gener children will be at risk with either parent." With reference to Mr. Gener he said "Mr. Gener is an anxious and impulsive individual that may act out with violent outburst. He feels very insecure and he has a poor self-image." Of Ms. Almodovar he said, "Ms Almodovar's ability to establish a good caring parental relation with her children is severely impaired due to her egocentric personality style. She reduces all relationships to the satisfaction of her own depending and affective needs while she herself is unable to give affection. Ms. Almodovar's children will always be at risk of emotional neglect and abuse due to their mother's personality disorder....."

There was no doubt that the natural parents had made some significant progress in the past years with respect to their own interpersonal relationship and their relationship with the girls. The court did not know what happened in

October, 1988. The court was glad to see the present progress, but could not overlook the fact that the events of October, 1988 crippled either parent's ability to function as a parent for almost two years. While this was not fatal to their relationship with the girls who were 5,6 and 7 at the time, it was with respect to Olay. Therefore, while the court believed the testimony of the New York social workers that all was going well in the Gener household; and believed Mr. Gener when he testified as to the help the family is getting from Reverend Manzano at the church the court believed it had no alternative but to terminate parental rights in the best interest of Olay. The court felt that the crisis in the lives of Eloy Gener and Graciela Almodovar came at the wrong time and lasted too long a time for them to be able to establish a parent-child relationship with Olay without significant permanent harm to the child.

The court has also considered and relied up the report of Donna DelPrete Marki the court appointed guardian for the child. Her observations seem consistent with those of Dr. Dyer and DYFS workers.

The court notes that Graciela Almodovar did not testify.

In conclusion, the Division of Youth and Family Services has presented clear and convincing evidence that parental rights should be terminated. The criteria set forth in New Jersey Div. of Youth and Family Services v. A.W. 103 N.J. 591 (1986) have been met. A return to the natural parents would result in harm. The parents are unable to rectify or eliminate that harm. Termination will not cause harm. The plan is for adoption by the M. family. It will provide Olay with the permanence and stability to which he is entitled. There is no alternative. As the Supreme Court said in A.W. at p. 605, "The potential return of a child to a

parent may be so injurious that it would bar such an alternative" Simply put, that is the situation we have in this case.

Ms. Livengood should submit an order terminating parental rights.

Yours very truly,

/s/ George P. Moser
George P. Moser, Jr, J.S.C.

GPM:af
File

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SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION - FAMILY PART
COUNTY OF HUDSON
DOCKET NO.: FG-09-73-91

IN THE MATTER OF THE GUARDIANSHIP OF	:	CIVIL ACTION
OLAY GENER Minor	:	ORDER

This matter having been opened to the Court on February 28, March 19 and March 26, 1991 by the New Jersey Division of Youth and Family Services, ROBERT J. DEL TUFO, ATTORNEY GENERAL OF NEW JERSEY, by Geraldine O. Livengood, Karen Kirchoff Saminski, Esq. appearing on behalf of Eloy Gener and Graciela Almodovar, natural parents of Olay Gener, Donna Del Prete Marki, Esq. appearing as Law Guardian on behalf of the minor Olay Gener, and the Court having heard testimony of witnesses on behalf of the Division of Youth and Family Services as well as on behalf of Eloy Gener and Graciela Almodovar, and the Court having received the written recommendation of the Law Guardian recommending termination of parental rights,

and the Court finding that the New Jersey Division of Youth and Family Services has met its burden of proof by clear and convincing evidence that the parental rights of Eloy Gener and Graciela Almodovar as to Olay Gener should be terminated and Olay Gener should be legally freed for adoption, and the Court finding that the best interests of the minor child, Olay Gener, require entry of this order and good cause having been shown,

IT IS ON THIS 22nd day of July, 1991

ORDERED that the child, Olay Gener, be committed to the guardianship, care, custody and control of the New Jersey Division of Youth and Family Services and that the parental rights between said child and the natural father, Eloy Gener, and the natural mother, Graciela Almodovar, be terminated for all purposes, including the right of the New Jersey Division of Youth and Family Services as such guardian to consent to the adoption of the child, Olay Gener, and to act fully and completely as guardian of the person and property of Olay Gener pursuant to N.J.S.A. 30:4C-15 through N.J.S.C. 30:4C-22.

/s/ Honorable George P. Moser, J.S.C.
Hon. George P. Moser, J.S.C.

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April 30, 1992

Ms. Elena Garcia Rivas
Division of Youth and Family Services
8901 Bergenline Avenue
North Bergen, New Jersey 07047

Dear Ms. Garcia Rivas:

I am writing to provide you with the results of my bonding assessment of Olay Gener (date of birth 8/22/88) whom I saw with his foster parents on 4/2/90 at your request. According to the referral materials provided by DYFS, Olay and his siblings were neglected by their natural parents and were not well fed, as evidence by a complete absence of any food in the home during a caseworkers visit. The natural father was arrested and jailed for using and selling narcotics. He is reportedly a violent and temperamental individual who intimidates other family members. He has physically abused Olay's natural mother. The four Gener children were placed in foster care on 10/28/88 after the natural mother disappeared. The parents have been resistant to the DYFS service plan and have not been attending recommended counseling sessions.

Interview with Mr. and Mrs. Victor Miranda

Martha Miranda, Olay's foster mother, gave her date of birth as 1/10/59. She claimed to possess a tenth grade education, which she received in Union City. She is not currently employed outside the home. She serves as a foster parent for Olay and one other infant. There are no other children in the home. Victor Miranda, born 3/15/52, completed the twelfth grade in New York City. He is currently employed as a meter reader for PSE&G.

Mrs. Miranda reported that Olay has been with them for 1 year and 3 months, since age 4 months. He visits his natural parents monthly and reacts with sleep problems and demanding to be held. He clings to his foster parents and cries when the worker comes to pick him up for these visits.

Mr. and Mrs. Miranda reported that they wanted to adopt Olay when they first took custody of him. They have become very attached to him over time. Olay plays with the young children of couples they are friendly with. There are no significant problems in caring for him. The Mirandas reported that Olay is very attached to them and that he moves closer to them for security when a stranger enters the home.

The Vineland Adoptive Behavior Scales, administered per the foster mother as informant yielded the following standard scores and percentiles for various skill areas:

Domain	Standard Score	Percentile
Communication	84	14
Daily Living Skills	93	32
Socialization	91	27
Motor Skills	114	82
Composite	93	32

These findings indicate normal developmental progress in all areas.

Observation of Olay with Mr. and Mrs. Miranda

Olay presented as a happy and relaxed child who sat in his foster father's lap holding up blocks and smiling. He

addressed his foster parents as "Mami" and "Papi" (Mama and Papa). Both foster parents behaved very affectionately and appropriately with Olay and they are obviously in love with this appealing, active 1-1/2 year old. Olay was observed to be alert, active and secure with the Mirandas. The overall quality of the parent-child interaction was excellent. The Mirandas set limits for Olay and explained to him why he must not touch certain things, encouraging him to anticipate consequences. Both foster parents were observed to be very skilful and competent in interacting with Olay and attuned to his needs.

Summary and Conclusions

This1-1/2 year old boy is bonded emotionally to his foster parents, who have been his only caretakers since early infancy. Visits with the natural parents elicit anxiety and generalized emotional upset. The foster parents represent Olay's primary source of nurturance, emotional security, guidance, support and protection. They are caring, competent caretakers who are very heavily emotionally invested in the child's welfare. Olay is progressing very well in all areas of development and he is happy and emotionally secure with his foster parents.

Removal of this boy from his foster parents would inflict extreme emotional duress upon him by depriving him of his psychological parents. Even a transfer for custody to the most attuned, skillful caretakers would be catastrophic for this child, who has known only the Mirandas as his parental love objects. A return of custody to unstable, inadequate caretakers, as the natural parents have proven to be, would severely compound the emotional damage resulting from such a loss. Even with a child as young as 19 months of age, the permanent harmful effects of a separation from the psychological parents cannot be overestimated. Such effects include impairments of basic trust, self esteem, ability to form

close emotional ties to others, and capacity to look forward with confident expectation to a predictable interpersonal environment.

It is my opinion that Olay Gener's best interests would be served by freeing him for adoption by his foster parents.

Please feel free to contact me if I can be of further assistance concerning this child.

Sincerely,

Frank J. Dyer, Ph.D.

Frank J. Dyer, Ph. D.
Diplomate in School Psychology
American Board of Professional
Psychology

In any other household, the scene would have been routine. But for Anna Schmidt, the ordinary *is* extraordinary. Eight months ago Anna was known as Baby Jessica, and pundits everywhere were dooming her to life in emotional hell ***

But she's not Baby Jessica anymore, and the unhappy epilogue that was mapped out for her hasn't materialized. "Everyone guaranteed-*guaranteed*- that she would have short-term trauma, that she wouldn't eat, she wouldn't sleep, she'd cry. It didn't happen.***

Within a month of moving to Iowa, Anna was toilet trained and had given up her bottle and pacifier-developmentally, right on schedule.***

Detroit psychoanalyst Lucy Biven, who was appointed by the Michigan courts to oversee Anna's transfer, believes that the Schmidts' elation isn't premature. "Anna never regressed, which meant her attachment to the Schmidts [forged during eight visits before the transfer] was good enough and strong enough that she used it to keep growing,"***

The plan was for Jessica to develop an affectionate relationship with Dan and Cara, to accept them as something akin to close family friends.***

"When Anna came home, it was like she had just been on vacation for a while." says Dan's sister, Rob Albertson.***

Supreme Court, U.S.
FILED
JUN 30 1994
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No. 93-1899

In The

Supreme Court of the United States

October Term, 1993

ELOY GENER PEREZ and GRACIELA ALMODOVAR,

Petitioners,

vs.

NEW JERSEY DIVISION OF YOUTH AND FAMILY SERVICES,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of New Jersey

BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Whether current parental unfitness is a constitutional prerequisite in order to terminate parental rights.

2. Whether *N.J.S.A.* 30:4C-20 is unconstitutional because it does not require a finding of current parental unfitness in order to terminate parental rights.

3. Whether *N.J.S.A.* 30:4C-20 was unconstitutionally applied in this case to terminate parental rights because the court did not find that the parents were unfit at the time of trial.

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No. 93-1899

In The

Supreme Court of the United States

October Term, 1993

ELOY GENER PEREZ and GRACIELA ALMODOVAR,

Petitioners,

vs.

NEW JERSEY DIVISION OF YOUTH AND FAMILY SERVICES,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of New Jersey

BRIEF IN OPPOSITION

Counter-Statement of the Case

This case involves a challenge to an order terminating parental rights as to a 5 year old upon a clear and convincing demonstration that the child will suffer short and long term psychological harm if he were to be removed from his foster parents and forced to construct a relationship with his birth parents. On Petitioners' first appeal of the termination of their parental rights in 1992, the New Jersey Appellate Division questioned whether the trial court's reliance on psychological bonding constituted sufficient grounds for termination under two recently issued New Jersey Supreme Court cases, *In the*

Matter of the Guardianship of J.C. and J.M.C., 129 *N.J.* 1, 608 *A.*2d 1312 (1992), and its companion, *In the Matter of the Guardianship of K.L.F.*, 129 *N.J.* 32, 608 *A.*2d 1327 (1992), which give direction to the New Jersey courts regarding the rigorous standards which must be applied when psychological bonding theories are a factor in a decision to terminate parental rights. Therefore, the matter was remanded on July 17, 1992, for reconsideration in light of those two decisions (Pa19a-22a). Upon remand, the court again terminated parental rights, finding that the evidence was clear and convincing that O.G. would suffer serious and enduring psychological harm if removed from his foster parents. (Pa8a-11a). The trial court issued an opinion dated November 9, 1992, in which it conducted an additional review of the evidence in light of the recent State Supreme Court decisions and determined that, even under the newly articulated stricter scrutiny directed by the court, termination of parental rights was warranted (Pa13a-17a). That decision was affirmed by the Appellate Division (Pa2a-3a) by decision dated October 22, 1993, with review by the Supreme Court of New Jersey denied by order dated February 8, 1994 (1a).

The basis for Petitioners' challenge of the trial court's decision to the state appellate courts was the failure of the Division's proofs to meet the applicable standard set forth in *New Jersey Division of Youth and Family Services v. A.W.*, 103 *N.J.* 591, 512 *A.*2d 438 (1986). Petitioners repeatedly argued that the State had not proven its case. However, the Appellate Division's affirmance of the trial court's second decision not only cited the trial judge's "thorough and thoughtful consideration" of both the proofs and of the applicable law, but also found the

decision justified by its own consideration of the record and of the law. Thus, the court's finding that O.G. would sustain significant permanent harm if he were to be removed from his psychological parents and that his relationship with them had grown during the most critical period in his psychological development during which his own parents had been "crippled" in their ability to function was a harm attributable to the parents (Pa10a-13a).

Thus, contrary to Petitioners' assertions that there was no finding of parental unfitness (Pb5) the trial court specifically found that Petitioners were unable to function as parents for almost two years, and that it was their inability to care for their son for those years that had permitted the development of a bond between him and his foster parents, the severance of which would cause him severe and enduring psychological harm. (Pa8a; 12a). Apparently, Petitioners believe that there must be a showing of present unfitness at the point of termination, notwithstanding a history of unfitness resulting in long-term foster care placement which creates a bond between the child and his foster parents that is of such significance that its severance would cause the child serious psychological harm. However, this is a position unsupported by law and one which significantly impairs a child's interest in securing a safe, stable and permanent home.

On May 13, 1994, the Family Court denied Petitioners' request for a Stay and entered a Judgment of Adoption allowing O.G. to be adopted by his foster parents.

Argument

The writ should be denied as this case presents no substantial constitutional questions not previously decided by this Court, because the procedural due process issue and the constitutionality of the New Jersey statutes governing termination of parental rights were not raised below, and because the decision of the Appellate Division is fully consistent with this Court's decisions involving a parent's Fourteenth Amendment rights.

A. The issues whether: a) *N.J.S.A.* 30:4C-20 is constitutional and b) whether the Petitioners were denied procedural due process were not raised in or passed upon by the state courts, and therefore should not be considered by this Court.

It is well-settled that this Court does not assume jurisdiction "to re-examine the final judgment of a state court [unless] the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system." *Webb v. Webb*, 451 *U.S.* 493 (1981), *citing, New York ex rel. Bryant v. Zimmermann*, 278 *U.S.* 63 (1928). Contrary to this principle, the Petitioners have raised two issues which were not raised in nor passed upon by the state court.

Initially it must be noted that, as posed, the first two questions presented for review are indistinguishable. The first query is "[w]hether the application by the New Jersey Courts of the best interests standard to terminate parental rights is unconstitutional," and the second is "[w]hether the best interests of the child standard was erroneously applied thus resulting in a wrongful termination of the petitioners' parental rights." Nevertheless,

from the argument offered in support of these issues, it appears that the first question posed is whether *N.J.S.A.* 30:4C-20, the New Jersey statute providing for termination of parental rights under a "best interests of the child" standard is unconstitutional insofar as it enables a court to terminate the rights of a currently fit parent based on a theory of psychological or physical harm to a child.

However, this constitutional challenge to New Jersey's statutory "best interests of the child" standard was never raised in the trial court, on the first appeal, on remand, on the second appeal, or on Petition for Certification to the New Jersey Supreme Court. Nor did Petitioners attack the constitutional sufficiency of the decision in *New Jersey Division of Youth and Family Services v. A.W.*, 103 *N.J.* 591, 512 *A.*2d 438 (1986), which formulated the standards to be met when termination of parental rights is sought under a "best interests" theory.[1] To the contrary, as the bulk of Petitioners' argument below maintained that the State had failed to meet the requirements of *A.W.*, it would appear that Petitioners had presumed *A.W.*, and therefore the statute, to be constitutional. Moreover, no discussion or even mention of the constitutionality of the best interests standard appears anywhere in the Petitioners' briefs below, nor was the question raised at oral argument. In fact, no citation to *N.J.S.A.* 30:4C-20, *N.J.S.A.* 30:4C-15, or *N.J.S.A.* 30:4C-15.1 appears in any of Petitioners' briefs below.

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[1] The four-pronged test established by the *A.W.* decision has been codified in *N.J.S.A.* 30:4C-15.1.

Additionally, Petitioners now assert that they were denied procedural due process when the Division did not act promptly on an alleged revocation of a voluntary placement agreement on April 20, 1989. However, the record conclusively shows that this issue was not raised below. Even assuming, *arguendo*, that Petitioners' point is well-taken, the record reveals that it was never established at trial that a revocation occurred. Rather, the alleged revocation consists of a statement by the natural father to a caseworker on April 20, 1989, as memorialized in the caseworker's notes, that he wanted the children back and that he will be looking for an apartment. However, on the same date in 1989, Mr. Perez also indicated to the caseworker that his current housing was temporary, in need of repair and not appropriate for children. While, at trial on February 28, 1991, counsel for Petitioners characterized the April 20, 1989, conversation, as a "revocation," the Division maintained that Mr. Perez had simply indicated his intention to work towards the return of his children. During the same conversation, he referred to himself as a "drug user", admitted that neither he nor the children's mother had a home for the children and maintained that if Ms. Almodovar was given the children, he would "kill her and himself." (Transcript of proceedings dated 2/28/91 at 42-19 to 25; 44-24 to 45-17; 46-7 to 9; 48-9 to 21). There was never a finding by the court that a revocation had occurred. Rather, the court found that it was the Division's assessment of the parents' lack of progress toward the reunification, not any "revocation" of the placement agreement, that precipitated the Division's custody litigation (Pa7a).

This Court may easily deduce the lack of proper presentation of the above issues from the failure of the New Jersey courts, in four written decisions below, to pass upon or even mention whether, in its opinion, the "best interests" standard is constitutional, or whether Petitioners were denied procedural due process. *See Webb v. Webb, supra,* 451 *U.S.* 493. Therefore, these issues should not be considered for the first time here. Regardless, in addressing the third question presented by Petitioners, the state will demonstrate that New Jersey's statutory scheme is fully consistent with this Court's decisions involving due process requirements in termination proceedings.

B. The State court decision below is fully consistent with this Court's decisions involving a parent's Fourteenth Amendment rights.

In New Jersey, termination of parental rights requires proof that a child has been harmed by parental behavior and that the parent has not relieved or cannot relieve the harm. The state's authority to seek termination of parental rights is governed by both statutory and decisional law. *N.J.S.A.* 30:4C-15 authorizes the state's child protection agency (the New Jersey Division of Youth and Family Services) to file a petition seeking termination of parental rights wherever it appears that the best interests of any child require such a remedy. *N.J.S.A.* 30:4C-15(c). *N.J.S.A.* 30:4C-15.1 sets forth in detail the meaning of best interests. That test codifies an earlier holding of the New Jersey Supreme Court set forth in *New Jersey Division of Youth and Family Services v. A.W.*, 103 *N.J.* 591, 512 *A.*2 438

(1986). In *A.W.*, the Court directed that a best interests inquiry required satisfaction of the following standard:

1. The child's health and development have been or will be seriously impaired by the parental relationship;

2. The parents are unable or unwilling to eliminate the harm and delaying permanent placement will add to the harm;

3. The court has considered alternatives to termination;

4. The termination of parental rights will not do more harm than good.

When the New Jersey court defined what it considered the appropriate outlines of a best interests analysis, it did so with full recognition of the constitutional significance of parental interests. Citing *Stanley v. Illinois*, 405 *U.S.* 645 (1972), the court in *A.W.* recognized that "the interests of parents in this relationship have thus been deemed fundamental and are constitutionally protected." *Id.* at 599. In the same decision, the court also acknowledged the constitutional requirement of the clear and convincing standard of proof required by *Santosky v. Kramer*, 455 *U.S.* 745 (1982). Nevertheless, the court also emphasized the settled principle that the state has "constitutional control over parental discretion in dealing with children when their physical or mental health is jeopardized." *Parham v. J.R.*, 442 *U.S.* 584, 603 (1979); *Wisconsin v. Yoder*, 406 *U.S.* 205, 230 (1972). Although the state must act with due deference to the privacy of the family relationship, its *parens patriae* obligation gives it "protective jurisdiction over children when their physical

or mental health is jeopardized." *DYFS v. A.W., supra* at 600.

According to New Jersey law, the central question to be decided in an application to terminate parental rights is the extent of the injury to the child arising from the existing parental relationship – whether the injury has already occurred or whether there is a potential for the injury if the parental relationship is resumed. The question that must be answered is "whether it is reasonably foreseeable that the parents can cease to inflict harm upon the children entrusted to their care. No more and no less is required of them than that they will not place their children in substantial jeopardy to physical or mental health." *DYFS v. A.W., supra* at 607. While the court did cite parentally inflicted physical and sexual abuse as examples of harm which might justify termination, clearly the court did not limit itself to those two examples as suggested in Petitioners' brief (Pb24). Indeed, the court held that "in some cases, the potential for emotional injury can be the crucial factor in child placement . . . the potential return of a child to a parent may be so injurious that it would bar such an alternative" *DYFS v. A.W., supra* at 604-605.

In a subsequently decided case, *Matter of Guardianship of J.C.*, 129 *N.J.* 1, 608 *A.*2d 1312 (1992), the court focused exclusively on just this type of injury. That case concerned the situation where the Division seeks termination of parental rights "not on grounds of current unfitness, but because of potential harm to the child based on separation from a foster parent with whom the child has bonded." *Id.* at 18. In deciding that such an injury constitutes a harm which, in an appropriate case, could lead to

termination of parental rights, the court reiterated its awareness of the federal constitutional significance of parental rights at stake. Thus, the court held that if current parental unfitness was not being alleged, "the quality of the proof adduced must be consistent with the interests at stake." *Id.* Citing *Santosky v. Kramer, supra,* the court ruled that the Division must prove by clear and convincing evidence that separating the child from his foster parents would cause "serious and enduring emotional or psychological harm." *Id.* at 19. Assuming that expert testimony and other evidence proved that the psychological injury was real rather than imagined, such injury could be attributed to the natural parents if the substitute care relationship had been allowed to develop over a period of time within which the parents should have been more attentive to their parental responsibilities. The court held that "prolonged inattention by natural parents that permits the development of disproportionately stronger ties between a child and foster parents may lead to a bonding relationship the severing of which would cause profound harm – a harm attributable to the natural parents and cognizable under the standards set forth in *A.W., supra.*" *Id.* at 18 (citation omitted).

The New Jersey Supreme Court unambiguously held that a finding of parental unfitness at the time of the termination proceedings was not required if the Division could prove that serious and enduring emotional harm would befall a child who was removed from a foster care relationship. While the Court cautioned that only the highest quality of proof could support such an assertion, and cautioned as well that a trial court must evaluate a

substitute parental relationship along with the birth parent relationship, it certainly did not hold that a theory emphasizing the great importance to be given to a psychological parenting relationship between a child and foster parent could be considered "unsound" because it is "controversial". *Id.* at 22. The trial court in this case reviewed the evidence a second time in light of the *J.C.* and *K.L.F.* decisions. It found that the proofs met the required strict standards. The appellate court commended the trial judge's "thorough and thoughtful consideration [of] the proofs before him and [of] the teaching of *J.C.* and *K.L.F.* and the earlier cases." (Pa3a).

While a state may require a finding of parental unfitness as a matter of legislative policy, this Court has never held that a finding of present parental unfitness is constitutionally mandated. In *Stanley v. Illinois, supra,* the Court held that every birth father, even one of an illegitimate child, had the right to a hearing to determine whether or not parental rights should be terminated. The state statute under consideration in that case required that lack of parental fitness be found before granting an adoption over a parent's objection. The constitutional infirmity found in the statute was simply that the state was required to show unfitness as a prerequisite to parental rights termination in every case except that involving fathers of illegitimate children. *Id.* at 405 *U.S.* 649. This Court did not address whether a finding of current parental unfitness was constitutionally required in every termination proceeding.

In *Quilloin v. Walcott,* 434 *U.S.* 246 (1978), this Court found no constitutional infirmity in a Georgia proceeding which allowed application of a best interests standard to

effect an adoption over the objection of the child's birth father who had never lived with or accepted any responsibility for the child's upbringing. Under the circumstances of that case, this Court held that the father's substantive due process rights were not violated by the lack of a finding of parental unfitness. Again in *Lehr v. Robertson*, 463 *U.S.* 248, 266 (1983) the Court considered the existence of a "substantial relationship" to be a constitutionally legitimate factor in determining appropriate procedures for adoption proceedings. At issue in that case was a New York statute which required notice of adoption proceedings to be served on a putative father only if he maintained his address in the "putative father registry". (The petitioner in that case did not fall into any other class of fathers who were required by the statute to be notified of adoption proceedings.) The Court found no constitutional infirmity in the procedure which did not require notification of the father despite the fact that the state had actual notice of his existence and whereabouts. In arriving at its conclusion that the child was properly adopted when she was approximately two years old by her mother's husband, without allowing her putative father to interpose an objection, the Court noted that "the existence or non-existence of a substantial relationship between parent and child is a relevant criterion in evaluating both the rights of the parent and the best interests of the child". *Id.* at 266.

Petitioners cite *Santosky v. Kramer, supra* for the proposition that "until the state proves parental unfitness, the child and his parents share a vital interest in preventing erroneous termination of their natural relationship." *Id.* at 760. Petitioners go on to contend that New Jersey's best

interests standard ignores this guidance. Implicit in Petitioners' argument is the equating of the parental unfitness discussed in *Santosky v. Kramer* with a finding of parental unfitness at the time of the termination trial. Nowhere in that or in any other case does support exist for such a proposition. In the instant case, for example, the court did not simply find that the child's relationship with his foster parents was of such significance that it should not be disturbed. Rather, the court found that the lengthy placement of Petitioners' children in foster care was necessitated by the natural parents' prolonged failure to correct the conditions that led to the placement. The court found that the combination of the parents' personal and legal problems – their intense and violent marital discord, their inability to concentrate on finding appropriate and stable housing, their failure to correct the problems noted by psychological evaluations – extended *the duration* of the foster care placement. In addition to its findings that the parents' own conduct was the major factor in the length of the placement, the court also found that O.G.'s placement in foster care took place during a critical period in his psychological development, leading to an intense attachment to his foster parents which could not be broken without his suffering severe psychological consequences (Pa8a).[2]

---

[2] Contrary to Petitioners' view (Pb12-18), this action was brought by the Division of Youth and Family Services against the Petitioners on behalf of the child. The foster parents were neither parties nor witnesses in the matter. The assertion that the State agency "fought the foster parents' battle for custody of O.G." (Pb18) is both legally inaccurate and factually untrue.

Therefore, the trial court in this case did find that the parents' own unfitness contributed substantially to the development of the youngest child's substantial psychological ties with his foster parents, ties which could not now be broken without catastrophic consequences for the child (Pa10a-11a). Such a conclusion does place responsibility on the birth parents, where it properly belongs, and does constitute a finding of unfitness that would meet constitutional standards. Such a finding implicitly recognizes the reality noted by the dissent in *Santosky*, namely, "the child has an interest in the outcome of the fact finding hearing, independent of that of the parent. The child's interest in a continuation of the family unit exists only to the extent that such a continuation would not be harmful to him. An error in the fact finding hearing that results in a failure to terminate a parent-child relationship which rightfully should be terminated may well detrimentally affect the child." *Santosky, supra* at 788-789. Thus, to say that the court failed to make a finding that the parents were *currently* unfit certainly does not mean that the court failed to evaluate the parents' conduct over an extended period of time and to weigh that conduct accordingly.

While no one disputes that parental rights are of constitutional significance, neglect of parental responsibility does not enjoy constitutional protection. *Parham v. J.R., supra.* A parent undeniably has a substantial constitutional interest in maintaining family ties. Yet, where that relationship produces substantial harm to the child, the state has a compelling interest, because of its *parens*

patriae role, in acting to prevent harm to the child. *Wisconsin v. Yoder, supra.* Parental conduct which is constitutionally protected is that conduct which does not "deprive the child of essential needs". *In re William L.*, 338 *A.*2d 1228 (Sup. Ct. of Penn. 1978). The latter case also recognized its jurisdiction's constitutional mandate that, where the parents' rights and the child's "essential physical and emotional needs" are in conflict, the interests of the child "the weaker party" should prevail. *Id.* at 1236.

As a matter of constitutional law, therefore, a finding of present parental unfitness is not mandated in a termination case. Rather, a finding that a parent's failure to take available steps in a timely fashion to remedy the need for a placement constitutes parental unfitness is constitutionally permissible. That was the finding made in this case.

Finally, federal courts have been unusually reluctant to interfere in the decisions of state courts in matters of family law. *United States v. Yazell*, 382 *U.S.* 341 (1966). As this court held in *Lehman v. Lycoming County Childrens Services*, 458 *U.S.* 502 (1982):

> there is little that can be as detrimental to a child's sound development as uncertainty over whether he is to remain in his current "home", under the care of his parents or foster parents, especially when such uncertainty is prolonged. Extended uncertainty would be inevitable in many cases if federal courts had jurisdiction to relitigate state custody decisions. [*Id.* at 513]

Indeed in the case at bar, the state court refused to grant a stay of the petition for adoption of this child by his foster parents. To disrupt the stability that this five year old

child has finally achieved by being adopted would be a tremendous and completely unwarranted disruption of his life.

Conclusion

For the reasons stated herein, it is respectfully submitted that the petition for certiorari should be denied.

Respectfully submitted,

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No. 93-1899

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1993

ELOY GENER PEREZ and GRACIELA ALMODOVAR,

Petitioners,

vs.

NEW JERSEY DIVISION OF YOUTH AND FAMILY SERVICES,

Respondent.

REPLY TO OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Petitioners, Eloy Gener Perez and Graciela Almodovar, replies solely to the issues first raised in the brief in opposition of Respondent, New Jersey Division of Youth and Family Services, without waiver of any of the points already addressed in the petition.

I

The Federal Claim Was Adequately Presented in the State System

Petioners made specific references to the unconstitutionality of terminating parental rights, without a finding of unfitness, in both their petition to the Supreme Court of the State of New Jersey and in their brief to the Appellate Division of the State of New Jersey. It was absolutely clear that Petioners constitutional challenge raised a federal claim and due process issue. In the petition to the Supreme Court of the State of New Jersey, in the section entitled "Issues Presented for Review", Petitioners stated as follows:

1. Is it constitutional to terminate a father and mother's parental rights when there is no finding of parental unfitness, however, there is a determination that bonding has occurred with the foster caretakers due primarily to DYFS' delay in reuniting the child with his natural parents?

***

3. Does the ***federal*** and state caselaw and statutory law relied upon by the lower courts support a termination of parental rights under the facts presented? (emphasis added)

In the section entitled "Errors Complained Of", Petitioners state as follows:

1. The parental rights of E.G.P. and G.A. have been unconstitutionally terminated due to there never having been a finding of parental unfitness.

***

3. The ***federal*** and state law relied upon does not support a termination of parental rights under the facts presented in this case. (emphasis added)

In Petioners' legal argument, under the section entitled "Why the Affirmance of the Appellate Division Should be Reversed", it is stated, "[t]hus until the State proves parental unfitness, the child and his parents share a vital interest in preventing erroneous termination of parental rights.' " Quoting, *Santosky v. Kramer*, 455 *U.S.* 745, 760; 71 *L.Ed. 2d* 599, 611 (1982).

Petitioners clearly challenged the federal and state constitutionality of terminating parental rights without a finding of unfitness. Additionally, Petitioners clearly challenged the federal and state constitutionality of terminating parental rights, when it is alleged that New Jersey's Division and Youth and Family Services delayed the reunification of parent and child, thus resulting in a violation of Petitioners' due process rights. Under the section entitiled "Comments on the Appellate Division Decision", Petitoners asserted, "E.P.G. and G.A. did everything that was asked of them by DYFS to secure the return of their children. It appears that DYFS prolonged the childrens return by creating new obstacles for them." It is disingenuous for Respondent to assert that the issue of a violation of due process was not raised in the petition to the New Jersey Supreme Court.

It states in Petitioners' brief to the New Jersey Appellate Division, under the legal argument section entitled "The Trial Court Erred in Terminating the Parental Rights of G.A. and E.G.P. to Their Son O.G." as follows: "[t]hus 'until the State proves parental unfitness, the child and his parents share a vital interest in preventing erroneous termination of parental rights,' " Quoting, *Santosky v. Kramer*, 455 *U.S.* 745, 760; 71 *L. Ed. 2d* 599, 611 (1982). Petitioners further stated, that "[the] Division's refusal to work with the parents and failure to offer services caused undue time to elapse." Petitoners give a plethora of examples in this brief as to the specific conduct of the Division of Youth and Family Services that resulted in the violation of Petitioners' due process rights. Again, the assertion by Respondent that the federal claim was not raised with the lower court is disingenuous.

This Court stated, "[i]t is a long-settled rule that the jurisdication of this Court to re-examine the final judgment of a state court can arise only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented." *Webb v. Webb*, 451 *U.S.* 493, 496; 101 *S. Ct.* 1889, 1892 (1981), *citing, New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67, 49 *S. Ct.* 61, 63 (1928); *Oxley Stave Co. v. Butler County*, 166 *U.S.* 648, 655, 17 *S. Ct.* 709, 711 (1897). A review of the Petition for Certification to the Supreme Court of the State of New Jersey and Petitioners' brief to the Appellate Divison of the State of New Jersey confirms, that not only is there a clear implication that the federal claim was raised below, it is clearly expressed by Petitioners as well.

II

The State Must Prove By Clear and Convincing Evidence That A Parent Is Unfit

Respondent asserts, that so long as *their* standard of termination of parental rights is proved by clear and convincing evidence, it passes federal constitutional scrutiny. Petioners assert that in *Santosky v. Kramer* the state must prove by clear and convincing evidence parental unfitness permanent neglect. *Santosky v. Kramer*, 455 *U.S.* 745, 760,761;102 *S. Ct.* 1388, 1398,1399 (1982). The argument by the Respondent gives little meaning to the clear and convincing evidentiary standard. In the case at hand, the State of New Jersey replaces parental unfitness or permanent neglect with the best interests of the child standard. It ignores the underlying message in *Santosky v. Kramer*, which is, that it is in the best interest of the child that the parental rights of their parents not be erroneously terminated. The United States Supreme Court has determined that the fourteenth amendment requires a finding of unfitness or permanent neglect by clear and convincing evidence, otherwise there is an erroronous termination.

Petitoners were never found to be unfit, abusive or neglectful of their children. In fact, three of their four children were returned to them six months before the hearing was held to terminate their parental rights to their youngest child, Olav. Their parental rights were terminated on a "psychological bonding theory". The argument of the State is that, it proved by clear and convincing evidence that the child had psychologically bonded with his foster caretakers, and therefore, Petitioners' parental rights should be terminated. Petitioners' argument is that there is no federal or state Constitutional basis for terminating their parental rights on this theory.

CONCLUSION

For the reasons stated in the petition for writ of certiorari, and because Respondent has not overcome those reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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